Supreme Court, U.S.
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In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question – #1

What good is a trial by jury when the presiding trial judge denies the Petitioner every opportunity to present evidence, even going so far as to disallow her treating physician, as well as other well respected experts, and even Petitioner's own testimony while she was being cross-examined when the trial judge stopped her testimony and dismissed her case with prejudice while at the same time dismissing her *due process rights under the Fourteenth Amendment*? (See last 3 pages of Cross-Examination of Petitioner by Respondent's attorney.)

Question – #2

What good is a trial by jury when the defense attorney is allowed to intentionally mislead the jury, by not being truthful, by taking statements out of context, and by trying to portray the Petitioner as committing fraud with the IRS, and the Petitioner is not allowed to present rebuttal evidence and also to use "the contempt of court" when the word contempt was not mentioned in the trial court and other exaggerations?

QUESTIONS PRESENTED – Continued

Question – #3 Abuse of discretion

Understanding that "Discretion of the Judge" is meant to designate that the judge has the power to rule and decide as his best judgment and sound discretion dictate but is it not an "abuse of that discretion" when the judge rules on a whim or unstable caprice, inconsiderate action, arbitrary will and total lawlessness under the constitution and its articles by disallowing important witnesses (see e-mail in appendix) to testify by not permitting the jury access to beneficial evidence for Petitioner, making improper comments to influence jury, showing bias, making rulings on evidence that deny a person a chance to convey her side and using an exaggerated description of the court behavior of the Petitioner, and imposing harsher sanctions than is the norm such as dismissing a case with prejudice before Petitioner's testimony was completed? (State v. Ferranto, 112 Ohio St. 667, 676-678 (1925)).

Question – #4 Recusal in Due Process

If *due process* requires a judge to recuse himself . . . Not only where there is *proof* a judge is actually biased, but also where an *objective* inquiry establishes a "*probability of bias*" on a judge's part, then why did the trial judge not recuse himself when he said early on that he knew the Respondent? (Caperton v. A.T. Massey Coal Co., 556 U.S. ___ (2009)).

PARTIES TO THE PROCEEDINGS

The Petitioner is: Andra Capaci

The Respondent is: Folmar Kenner, LLC

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The opinions of the Alabama Supreme Court and Alabama Civil Appeals Court are unpublished, but are attached in the appendix.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on January 22, 2010.

The jurisdiction of this court rests upon 28 U.S.C. Section 1257 (Courts of our Dual Judicial System). 28 U.S.C. Section 1257a provides that the U.S. Supreme Court may review cases from the highest court of a state.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution reads in relevant part: "Congress shall make no law . . . abridging the right of the people . . . to petition the government for a redress of grievances."

2. The First Amendment to the United States Constitution reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . "

3. The First Amendment to the United States Constitution reads in relevant part: "Congress shall

make no law . . . abridging . . . the right of people peaceably to assemble . . . "

4. The Fifth Amendment to the United States Constitution reads in relevant part: "No person shall be . . . deprived of liberty, or property, without due process of law . . . "

5. The Fourteenth Amendment to the United States Constitution reads in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. Article III of the Constitution in Section 2 reads in relevant part: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority . . . "

Rules:

Rule 10. Considerations Governing Review on Writ of Certiorari

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28 U.S.C. Section 1257 (Courts of our Dual Judicial System) 28 U.S.C. Section 1257a

STATEMENT OF THE CASE

This action was initiated by Counterclaimant-Defendant-Respondent Folmar Kenner, LLC ("Folmar") against Counterclaimant-Petitioner Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") for breach of shopping center lease. (C.1). Capaci counterclaimed for breach of the covenant of quiet enjoyment and constructive eviction. (C.4). In particular, Capaci alleged breach of contract, negligence and willfulness in the failure of the landlord Folmar to properly construct and maintain the premises, resulting in the growth and proliferation of toxic mold, causing her bodily injury damage and forcing her to vacate the premises to incur extra expenses and cost in doing so. (C.28-29).

The claims of Folmar against Capaci were ultimately settled before trial by Capaci's liability insurer. (C.971). Trial on Capaci's counterclaims commenced on February 6, 2007. (C.1649). Near the close of the fourth day of trial, Ms. Capaci was testifying on the stand. After several warnings to keep her answers responsive to the questions, the court terminated her testimony, terminated the trial, and sua sponte dismissed Capaci's counterclaims with prejudice. (R.644; C.1507).

An order dismissing the counterclaims and entering judgment for Folmar was entered on March 21, 2007. (C.1507). Costs were taxed against Capaci. (*Id.*) A motion for new trial or to alter or amend the judgment was filed on April 27, 2007 (C.1511), and was denied on April 25, 2007. (C.1617). A timely notice of appeal was thereafter filed on May 2, 2007. (C.1618).

ARGUMENT

Question 1

Petitioner was not able to experience a fair trial due to the actions of the trial judge. His very impatience and harsh tonality only served to make this Petitioner extremely nervous, but never wilful or contumacious. A reading of the record, especially the last three pages of the Cross-Examination by the Respondent's attorney would illustrate a Petitioner who tried hard to FOCUS but was unable to. Petitioner would simply forget to try not to explain her

answers. The word, "contempt" was never used by the trial judge. Petitioner was never accused of contempt nor was her conduct questioned, but, rather, of not answering the way the judge wanted. Yet, the Supreme Court of Alabama in their Opinion refer to Petitioner as having contempt of court. The trial judge deprived me the opportunity to present my evidence to the jury and to recover my damages which were estimated to be between $500,000 and $700,000. The cost of this lawsuit has also been a hardship on Petitioner, and thus the reason for pro se.

Question 2

The defense attorney was given free rein by the judge to do whatever he pleased. His questions to Petitioner were argumentative, based on lies and deceit. He tried to discredit the Petitioner's credibility by telling the jury prior to questioning the Petitioner that he was going to prove she committed fraud with the IRS. This remark was untrue.

Question 3

The trial court's involuntary dismissal with prejudice in this action was an abuse of discretion. His ruling was harsh and unusual. The inconsiderate action of the judge can be further illustrated by an e-mail (the day after his testimony) from my expert witness, Dr. Lipsey. The judge also had no regard for the Constitution and its articles by disallowing important witnesses to testify, by not permitting the jury access to beneficial evidence for Petitioner,

making improper comments to influence the jury, showing extreme bias, making rulings on evidence that deny a person a chance to convey her side, and allowing the defense attorney to be unfair in his questioning of Petitioner's expert witness and also the Petitioner herself. This judge also imposed harsher sanctions than is the norm by dismissing a case with prejudice before Petitioner's testimony was completed? (State v. Ferranto, 112 Ohio St. 667, 676-678 (1925)).

Question 4

Due process requires a judge to recuse himself. . . . Not only where there is proof a judge is actually biased, but also where an objective inquiry establishes a "*probability of bias*" on a judge's part. Since this trial judge said in the very beginning of the trial that he knew the Respondent he should have stepped down and recused himself. It is a violation of due process for this judge to force an outcome of this trial for his friend. (Caperton v. A.T. Massey Coal Co., 566 U.S. ___ (2009)).

CONCLUSION

Petitioner, Andra Capaci, a 71-year-old female resident of Louisiana, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama in this case.

In plain contravention of the requirements of the Constitution of the United States and Federal Laws, the state Supreme Court of Alabama has embarked on an ad hoc standardless, and lawless exercise of judicial power which appears designed to thwart the very rules and laws of this country.

Because one and all are governed directly by the Constitution, the Alabama's court decision involves issues of the utmost federal importance. Due to the Respondent's attorney's false and baseless allegations, his exaggerations against Petitioner and by the lower Circuit Court Judge's blatant abuse of discretion by not allowing Petitioner her day in court thereby impeding Capaci's constitutional rights of due process.

Upon reconsideration and review the Petitioner respectfully requests that the Supreme Court will have the final decision in granting her relief, however they see appropriate.

Respectfully submitted,

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

1070824

Ex parte Folmar Kenner, LLC

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Filed Sep. 18, 2009)

(In re: Andra Capaci d/b/a Andra Capaci Real Estate

v.

Folmar Kenner, LLC)

(Mobile Circuit Court, CV-04-2311; Court of Civil Appeals, 2060846)

PER CURIAM.

Folmar Kenner, LLC, petitioned this Court for a writ of certiorari to review the Court of Civil Appeals' decision reversing the trial court's sua sponte dismissal, with prejudice, under Rule 41(b), Ala. R. Civ. P., of the counterclaims filed against Folmar Kenner by Andra Capaci, doing business as Andra Capaci Real Estate. See *Andra Capaci d/b/a Andra Capaci Real Estate v. Folmar Kenner, LLC*, [Ms. 2060846, March 7, 2008] ___ So. 3d ___ (Ala. Civ. App. 2008). We granted certiorari review to consider, as a material question of first impression, whether the trial court exceeded its discretion by dismissing Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P., for failing to follow its orders during trial. See Rule 39(a)(1)(C), Ala. R. App. P. For the following reasons, we reverse the Court of Civil Appeals' judgment.

Facts and Procedural History

In its opinion, the Court of Civil Appeals summarized the relevant procedural history and undisputed facts:

> "Folmar Kenner, LLC, sued Andra Capaci, doing business as Andra Capaci Real Estate, seeking damages on claims related to Capaci's alleged breach of a lease agreement. Capaci answered and counterclaimed, alleging that the leased premises were unfit for occupancy and seeking damages on several

claims, including negligence, wantonness, and breach of the lease agreement.

"The dispute between the parties arose after Capaci discovered that the leased premises were infested with mold and she vacated the premises. Folmar Kenner remedied or attempted to remedy the mold problem, but some of Capaci's personal property that she had left in the premises was damaged in the process. Although Folmar Kenner represented that it was safe for Capaci to return to the leased premises after it had performed its remedial measures, Capaci refused to do so. Folmar Kenner then claimed that Capaci had breached the lease agreement. Capaci claimed that she had suffered physical injury and emotional distress as a result of her exposure to toxic mold. She also sought to recover the value of the personal property that she alleged Folmar Kenner had damaged during its attempts to remedy the mold problem in the leased premises.

"On July 27, 2006, Folmar Kenner filed an offer of judgment pursuant to Rule 68, Ala. R. Civ. P., in the amount of $25,000. Capaci did not accept that offer. On January 8, 2007, the parties filed a joint motion indicating that Folmar Kenner's claims against Capaci had been settled; the parties moved for a dismissal of those claims. The record contains no indication that the trial court ruled on that motion, but the parties represented to the trial court at the start of the

trial that those claims had been settled, and those claims were not prosecuted at the trial.

"The case proceeded to a jury trial solely on Capaci's counterclaims against Folmar Kenner. On February 28, 2007, the fourth day of the jury trial, Capaci testified. During her responses on direct examination, Capaci repeatedly volunteered information beyond that sought by the questions. Folmar Kenner objected repeatedly to answers Capaci gave, arguing that Capaci's responses to questions asked of her exceeded the scope of the question that had been asked. During her direct examination, the trial court warned Capaci that if she continued to volunteer information, it would 'terminate [her] testimony.'

"The cross-examination of Capaci by Folmar Kenner was contentious at times. Folmar Kenner repeatedly objected to Capaci's elaborating or expanding her answers to provide information beyond that which was necessary to properly respond to the questions. The trial court continued to warn Capaci to limit her responses to the questions actually asked. The trial court also explained to Capaci that her attorney could ask her additional questions on redirect examination so that she could fully explain the answers she gave on cross-examination. However, despite the repeated warnings, Capaci continued to volunteer information and expound on her answers.

"The trial court then warned Capaci again, telling her that that warning was the last one it would give and that '[t]his trial will end the next time you volunteer an answer that is not requested by the question.' In response, Capaci, as she had done several times before, told the trial court that she was nervous testifying in court.

"In spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination. Then, when Capaci continued to explain her answers and volunteer information, the trial court dismissed the jury and ended the trial. After the jury had been dismissed, the trial court stated:

> "'I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs attached to the plaintiff on this matter.'"

Capaci, ___ So. 3d at ___.

The Court of Civil Appeals then set forth the standard of review of a trial court's decision to dismiss an action with prejudice under Rule 41(b), Ala. R. Civ. P.:

"This court, in discussing dismissals pursuant to Rule 41(b), has stated:

"'Rule 41(b), Ala. R. Civ. P., permits a trial court to dismiss an action when a plaintiff fails to prosecute that action or fails to comply with the Rules of Civil Procedure or orders of the court. . . . Typically, an appellate court will review a dismissal pursuant to Rule 41(b) to determine only whether the trial court abused its discretion. *Riddlesprigger [v. Ervin],* 519 So. 2d [486,] 487 [(Ala. 1987)].

"'"However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations," and "appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside." *Smith v. Wilcox County Bd. of Educ.,* 365 So. 2d 659, 661 (Ala. 1978) (citing, among other things, 9 Wright & Miller, Federal Practice & Procedure § 2370, p. 203, n. 1). Our supreme court has explained that "the plaintiff's conduct must mandate the dismissal," and it has further reiterated the rule espoused by the United States Court of Appeals for the Fifth Circuit that a trial court "may dismiss with prejudice an action 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'" *Smith,* 365 So. 2d at 661 (quoting *Durham v.*

> *Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967))."
>
> "*Kendrick v. Earl's, Inc.*, 987 So. 2d 589, 592-93 (Ala. Civ. App. 2007)."

Capaci, ___ So. 3d at ___.

Before the Court of Civil Appeals, Capaci argued that the evidence did not support a finding that her conduct during her testimony was willful or contumacious, and she argued that the trial court could have imposed a lesser sanction than the dismissal of her counterclaims with prejudice. The Court of Civil Appeals agreed with Capaci. It reversed the trial court's dismissal of Capaci's counterclaims, holding as follows:

> "We must conclude that under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying. We recognize the difficult job of the trial court in dealing with noncompliant witnesses or parties. A trial court certainly may take measures necessary to maintain order in its courtroom. In fact, with regard to the specific facts of this case, we agree with the trial court that Capaci's failure to heed the trial court's warnings warranted some form of sanction. However, the trial court had available to it other, less drastic alternatives in enforcing its orders. Those less drastic sanctions included, but were not limited to,

> ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt.
>
> "We recognize and sympathize with the trial court's frustration over Capaci's behavior. Conduct such as that exhibited by Capaci is not to be condoned. The trial court was well within its power to take action to sanction Capaci for disobeying its orders in its courtroom. However, given the totality of the evidence, we conclude that Capaci's conduct did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not '"mandate dismissal."' *Hosey v. Lowery,* 911 So. 2d [15,] 17 [(Ala. Civ. App. 2005)]."

Capaci, ___ So. 3d at___. Folmar Kenner then petitioned this Court for certiorari review of the Court of Civil Appeals' decision. We reverse and remand.

Standard of Review

The trial court's action in dismissing Capaci's counterclaims was apparently based on its finding of contempt for Capaci's failure to adhere to the court's repeated orders instructing Capaci to confine her answers to the questions posed by counsel during her testimony. The trial court's conclusion as to the credibility of the excuse proffered by Capaci for disregarding those instructions is therefore presumed

correct. See *Gilbert v. Nicholson*, 845 So. 2d 785, 791 (Ala. 2002) ("When evidence in a contempt case is presented ore tenus to the trial court, the trial court's finding regarding contempt is presumed correct."). A finding of contempt is "'"a determination committed to the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm."'" *S.A.T. v. E.D.*, 972 So. 2d 804, 809 (Ala. Civ. App. 2007) (quoting *Nave v. Nave*, 942 So. 2d 372, 377 (Ala. Civ. App. 2005), quoting in turn *Stack v. Stack*, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)).

Discussion

The controlling issue of law is whether the trial court exceeded its discretion in dismissing Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P. Folmar Kenner contends that Capaci's "testimonial misconduct" justified the trial court's actions because, it says, her misconduct was willful and contumacious. Folmar Kenner also contends that no lesser sanctions were available to the trial court that would have promoted a fair and just adjudication of Capaci's claims against Folmar Kenner. Capaci maintains that her conduct was neither willful nor contumacious.

As the Court of Civil appeals noted, the factual situation presented in this case is novel:

> "Most of the cases that address the sanction of a Rule 41(b) dismissal involve situations in which a party purportedly has failed to prosecute his or her action or has failed to comply with pretrial orders. *See Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991) (affirming a dismissal with prejudice when the plaintiff had failed to comply with previous court orders and had initiated another round of litigation); *Burdeshaw v. White*, 585 So. 2d 842 (Ala. 1991) (reversing a dismissal with prejudice when the plaintiff's conduct did not show a willful or contumacious failure to prosecute the action); *Henderson v. G & G Corp.*, 582 So. 2d 529 (Ala. 1991) (the evidence supported a dismissal with prejudice for failure to prosecute the action); *Cabaniss v. Wilson*, 501 So. 2d 1177 (Ala. 1986) (the evidence did not support a dismissal with prejudice for failure to prosecute the action); *Kendrick v. Earl's, Inc.*, supra (reversing dismissal judgments when there were insufficient bases for those judgments); *Harris v. Cleveland*, 979 So. 2d 78 (Ala. Civ. App. 2007) (reversing a dismissal with prejudice for failure to prosecute when the evidence did not support such a drastic sanction); *Hosey v. Lowery*, 911 So. 2d 15 (Ala. Civ. App. 2005) (dismissal with prejudice was too extreme a sanction for counsel's failure to appear at a hearing); *State ex rel. S.M. v. A.H.*,

> 832 So. 2d 79 (Ala. Civ. App. 2002) (reversing a dismissal with prejudice when the evidence did not support a finding that there had been a willful or contumacious delay in prosecuting the action); and *Goodley v. Standard Furniture Mfg. Co.*, 716 So. 2d 226, 227 (Ala. Civ. App. 1998) (the failure to appear at a hearing did not warrant a dismissal with prejudice '[b]ecause the record reveal[ed] no delay, willful default, or contumacious conduct'). *See also Weatherly v. Baptist Med. Ctr.*, 392 So. 2d 832 (Ala. 1981) (reversing a dismissal with prejudice under Rule 37, Ala. R. Civ. P., when the evidence did not support a determination that the plaintiff had willfully failed to respond to interrogatories). It does not appear from the research conducted by this court that the dismissal of claims due to a failure to comply with court rulings during a trial has been previously addressed or sanctioned by our courts."

Capaci, ___ So. 3d at ___. Although the factual situation presented by this case may be novel, the rules concerning the trial court's power to dismiss a case with prejudice under Rule 41(b) are well established.

Rule 41(b), Ala. R. Civ. P., states, in pertinent part:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this

> subdivision . . . operates as an adjudication upon the merits."

Concerning the scope of Rule 41(b), this Court held in *Riddlesprigger v. Ervin,* 519 So. 2d 486 (Ala. 1987):

> "Rule 41(b) has been construed to mean that a trial court has the inherent power to dismiss a cause for want of prosecution or for failure to comply with court rules or orders. *Ryder Int'l Corp. v. State,* 439 So. 2d 162 (Ala. Civ. App. 1983). *Accord, Link v. Wabash R.R.,* 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). Such a dismissal is generally considered to be within the sound discretion of the trial court and will be reversed on appeal only for an abuse of that discretion. *Whitehead v. Baranco Color Labs, Inc.,* 355 So. 2d 376 (Ala. Civ. App. 1978). It need only be determined, upon appellate review of a trial court's action under Rule 41(b), whether the ruling is supported by the evidence. *Strickland v. National Gypsum Co.,* 348 So. 2d 497 (Ala. Civ. App. 1977); *Nettles v. First Nat'l Bank,* 388 So. 2d 916 (Ala. 1980).
>
> ". . . .
>
> "As this Court has heretofore observed:
>
> "'In Alabama, and many federal courts, the interest in disposing of the litigation on the merits is overcome and a dismissal may be

> granted when there is a *clear record of delay, willful default or contumacious conduct by the plaintiff. Smith v. Wilcox County Board of Education,* 365 So. 2d [659] at 661 [(Ala. 1978)]. See, e.g., *Boazman v. Economics Laboratory, Inc.,* 537 F.2d 210 (5th Cir. 1976); *Pond v. Braniff Airways,* 453 F.2d 347 (5th Cir. 1972). Willful default or conduct is a conscious or intentional failure to act. *Welsh v. Automatic Poultry Feeder Co.,* 439 F.2d 95 (8th Cir. 1971). "Willful" is used in contradistinction to accidental or involuntary noncompliance. No wrongful motive or intent is necessary to show willful conduct.'
>
> "*Selby v. Money,* 403 So. 2d 218, 220 (Ala. 1981)."

519 So. 2d at 487-88. Further, this Court has held that "[b]ecause the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court." *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 604 So. 2d 332, 341 (Ala. 1991) (citations omitted).

In reversing the trial court's judgment of dismissal, the Court of Civil Appeals failed to follow the well established rule that it acknowledged in its opinion: "The determination of whether a party's

conduct was willful or contumacious is within the trial court's discretion. 'Because the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss . . . will be accorded considerable weight. . . .'" *Capaci*, ___ So. 3d at ___ (quoting *Jones*, 604 So. 2d at 341). The Court of Civil Appeals recognized the trial court's inherent power to dismiss a case under Rule 41(b), Ala. R. Civ. P., given the trial court's numerous warnings and orders to Capaci while she was testifying and Capaci's demonstrated disregard for those warnings and orders. However, the Court of Civil Appeals, after considering the "totality of the evidence," held that

> "under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying."

Capaci, ___ So. 3d at ___.

The Court of Civil Appeals substituted its judgment for that of the trial court when, based on Capaci's testimony that she was nervous about testifying, it concluded that Capaci's conduct was not sufficiently willful or contumacious to mandate the dismissal of her counterclaims with prejudice. In so doing, the Court of Civil Appeals, instead of simply reviewing the record to determine if the trial court's actions were supported by the evidence, appropriated

the trial court's inherent power to dismiss a case for failure to comply with its orders.

The Court of Civil Appeals did not hold that the record was void of evidence to support the trial court's holding that Capaci's conduct was willful or contumacious; in fact, the record contains evidence that supports the trial court's holding. The Court of Civil Appeals recognized the trial court's numerous orders to Capaci to refrain from elaborating or expanding her answers beyond that necessary to properly respond to the questions posed by counsel and recognized the trial court's warnings to Capaci regarding the potential consequences of her persistent misconduct: "the trial court warned Capaci that if she continued to volunteer information, it would 'terminate [her] testimony,'" ___ So. 3d at ___; "[t]he trial court continued to warn Capaci to limit her responses to the questions actually asked," ___ So. 3d at ___; "[h]owever, despite the repeated warnings, Capaci continued to volunteer information and expound her answers," ___ So. 3d at ___; "[t]he trial court then warned Capaci again, telling her that that warning was the last one it would give and that '[t]his trial will end the next time you volunteer an answer that is not requested by the question,'" ___ So. 3d at ___; "[i]n spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination," ___ So. 3d at ___; and "the trial court did warn Capaci of the potential consequences of her conduct," ___ So. 3d at ___. Further, the Court of Civil Appeals found that

Capaci had unquestionably refused to follow the trial court's orders during trial and that such misconduct merited some form of sanction. ___ So. 3d at ___. Capaci's conduct could certainly be considered "willful," as this Court has defined that term. There is evidence to support the trial court's holding that Capaci consciously, as opposed to accidentally or involuntarily, failed to follow the trial court's repeated orders. Moreover, Capaci's motive or intent is inconsequential to a determination that she acted willfully. See *Selby v. Money,* 403 So. 2d 218, 220 (Ala. 1981).

However, based solely on Capaci's testimony that she was nervous about testifying, the Court of Civil Appeals disregarded the trial court's determination that Capaci's conduct was willful or contumacious and made its own determination, from a cold record, that her conduct was neither willful nor contumacious. In doing so, the Court of Civil Appeals disregarded the well established principle that the trial court is far better situated than is an appellate court to determine whether Capaci's conduct was willful or contumacious because the trial court has the advantage of personally observing the witness's testimony and is not confined to a removed reading of a cold record. See *Bentley Sys., Inc. v. Intergraph Corp.,* 922 So. 2d 61, 81 (noting that a trial court has a distinct advantage over an appellate court in making determinations based on testimony because it can see and hear the witness firsthand as the witness testifies and can question the witness if necessary). Therefore, we conclude that the trial court did not exceed

its discretion in dismissing with prejudice Capaci's counterclaims under Rule 41(b), Ala. R. Civ. P.

We conclude that the record supports the trial court's decision to dismiss Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P., and, thus, that the trial court did not exceed its discretion in doing so. In substituting its judgment for that of the trial court's, the Court of Civil Appeals did not give the trial court's judgment the proper deference. Therefore, we reverse the Court of Civil Appeals' judgment holding that the trial court exceeded its discretion in dismissing Capaci's counterclaims.

It is also necessary to remand this case to the Court of Civil Appeals for further proceedings consistent with this opinion. The Court of Civil Appeals stated in its opinion that "Capaci raises several [other] arguments [concerning the taxation of court costs] on appeal," but it found "the dispositive issue to be whether the trial court erred in dismissing with prejudice her claims against Folmar Kenner." *Capaci*, ___ So. 3d at ___. Ultimately, the Court of Civil Appeals held in its conclusion that "[b]ecause we find Capaci's argument on [the dismissal-with-prejudice] issue to be dispositive, we pretermit discussion of the other issues [concerning the taxation of court costs] raised by Capaci in her appellate brief." *Id.* at ___. Therefore, the Court of Civil Appeals must now address those other issues.

Conclusion

Based on the foregoing, the judgment of the Court of Civil Appeals is reversed and the case remanded to the Court of Civil Appeals for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

Notice: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2007-2008

2060846

Andra Capaci d/b/a
Andra Capaci Real Estate

v.

Folmar Kenner, LLC

Appeal from Mobile Circuit Court
(CV-04-2311)

(Filed Mar. 7, 2008)

THOMPSON, Presiding Judge.

Folmar Kenner, LLC, sued Andra Capaci, doing business as Andra Capaci Real Estate, seeking damages on claims related to Capaci's alleged breach of a lease agreement. Capaci answered and counterclaimed, alleging that the leased premises were unfit

for occupancy and seeking damages on several claims, including negligence, wantonness, and breach of the lease agreement.

The dispute between the parties arose after Capaci discovered that the leased premises were infested with mold and she vacated the premises. Folmar Kenner remedied or attempted to remedy the mold problem, but some of Capaci's personal property that she had left in the premises was damaged in the process. Although Folmar Kenner represented that it was safe for Capaci to return to the leased premises after it had performed its remedial measures, Capaci refused to do so. Folmar Kenner then claimed that Capaci had breached the lease agreement. Capaci claimed that she had suffered physical injury and emotional distress as a result of her exposure to toxic mold. She also sought to recover the value of the personal property that she alleged Folmar Kenner had damaged during its attempts to remedy the mold problem in the leased premises.

On July 27, 2006, Folmar Kenner filed an offer of judgment pursuant to Rule 68, Ala. R. Civ. P., in the amount of $25,000. Capaci did not accept that offer. On January 8, 2007, the parties filed a joint motion indicating that Folmar Kenner's claims against Capaci had been settled; the parties moved for a dismissal of those claims. The record contains no indication that the trial court ruled on that motion, but the parties represented to the trial court at the start of the trial that those claims had been settled, and those claims were not prosecuted at the trial.

The case proceeded to a jury trial solely on Capaci's counterclaims against Folmar Kenner. On February 28, 2007, the fourth day of the jury trial, Capaci testified. During her responses on direct examination, Capaci repeatedly volunteered information beyond that sought by the questions. Folmar Kenner objected repeatedly to answers Capaci gave, arguing that Capaci's responses to questions asked of her exceeded the scope of the question that had been asked. During her direct examination, the trial court warned Capaci that if she continued to volunteer information, it would "terminate [her] testimony."

The cross-examination of Capaci by Folmar Kenner was contentious at times. Folmar Kenner repeatedly objected to Capaci's elaborating or expanding her answers to provide information beyond that which was necessary to properly respond to the questions. The trial court continued to warn Capaci to limit her responses to the questions actually asked. The trial court also explained to Capaci that her attorney could ask her additional questions on redirect examination so that she could fully explain the answers she gave on cross-examination. However, despite the repeated warnings, Capaci continued to volunteer information and expound on her answers.

The trial court then warned Capaci again, telling her that that warning was the last one it would give and that "[t]his trial will end the next time you volunteer an answer that is not requested by the question." In response, Capaci, as she had done

several times before, told the trial court that she was nervous testifying in court.

In spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination. Then, when Capaci continued to explain her answers and volunteer information, the trial court dismissed the jury and ended the trial. After the jury had been dismissed, the trial court stated:

> "I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs attached to the plaintiff on this matter."

Before the trial court had entered a judgment on its February 28, 2007, oral ruling, Folmar Kenner filed a motion seeking to tax the costs of the action against Capaci. In that motion, Folmar Kenner cited Rule 54, Ala. R. Civ. P., and Rule 68, Ala. R. Civ. P. On March 21, 2007, the trial court entered a judgment dismissing Capaci's counterclaims with prejudice and ordering that costs be taxed against her. Capaci filed a postjudgment motion, arguing that the trial court had erred in dismissing her claims and in ordering that she pay the costs of the action. The trial court denied Capaci's postjudgment motion, and Capaci timely appealed. The supreme court transferred the appeal to this court pursuant to § 12-2-7, Ala. Code 1975.

Capaci raises several arguments on appeal. We find the dispositive issue to be whether the trial court erred in dismissing with prejudice her claims against Folmar Kenner. Pursuant to Rule 41(b), Ala. R. Civ. P., a trial court may dismiss a party's claims "[f]or failure . . . to prosecute or to comply with these rules or any order of court," and a dismissal under Rule 41(b) "operates as an adjudication upon the merits."

This court, in discussing dismissals pursuant to Rule 41(b), has stated:

> "Rule 41(b), Ala. R. Civ. P., permits a trial court to dismiss an action when a plaintiff fails to prosecute that action or fails to comply with the Rules of Civil Procedure or orders of the court. . . . Typically, an appellate court will review a dismissal pursuant to Rule 41(b) to determine only whether the trial court abused its discretion. *Riddlesprigger[v. Ervin],* 519 So. 2d [486,] 487 [(Ala. 1987)].
>
> "'However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations,' and 'appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside.' *Smith v. Wilcox County Bd. of Educ.,* 365 So. 2d 659, 661 (Ala. 1978) (citing, among other things, 9 Wright & Miller, *Federal Practice & Procedure* § 2370, p. 203, n. 1). Our supreme court has explained that 'the plaintiff's conduct must mandate the dismissal,' and it has further reiterated the rule espoused by the United States Court of

> Appeals for the Fifth Circuit that a trial court 'may dismiss with prejudice an action "only in the face of a clear record of delay or contumacious conduct by the plaintiff."' *Smith,* 365 So. 2d at 661 (quoting *Durham v. Florida East Coast Ry. Co.,* 385 F.2d 366, 368 (5th Cir. 1967))."

Kendrick v. Earl's, Inc., [Ms. 2060719, Dec. 14, 2007] ___ So. 2d ___, ___ (Ala. Civ. App. 2007).

Most of the cases that address the sanction of a Rule 41(b) dismissal involve situations in which a party purportedly has failed to prosecute his or her action or has failed to comply with pretrial orders. *See Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991) (affirming a dismissal with prejudice when the plaintiff had failed to comply with previous court orders and had initiated another round of litigation); *Burdeshaw v. White,* 585 So. 2d 842 (Ala. 1991) (reversing a dismissal with prejudice when the plaintiff's conduct did not show a willful or contumacious failure to prosecute the action); *Henderson v. G & G Corp.,* 582 So. 2d 529 (Ala. 1991) (the evidence supported a dismissal with prejudice for failure to prosecute the action); *Cabaniss v. Wilson,* 501 So. 2d 1177 (Ala. 1986) (the evidence did not support a dismissal with prejudice for failure to prosecute the action); *Kendrick v. Earl's, Inc.*, supra (reversing dismissal judgments when there were insufficient bases for those judgments); *Harris v. Cleveland,* [Ms. 2060629, Aug. 3, 2007] ___ So. 2d ___ (Ala. Civ. App. 2007) (reversing a dismissal

with prejudice for failure to prosecute when the evidence did not support such a drastic sanction); *Hosey v. Lowery*, 911 So. 2d 15 (Ala. Civ. App. 2005) (dismissal with prejudice was too extreme a sanction for counsel's failure to appear at a hearing); *State ex rel. S.M. v. A.H.*, 832 So. 2d 79 (Ala. Civ. App. 2002) (reversing a dismissal with prejudice when the evidence did not support a finding that there had been a willful or contumacious delay in prosecuting the action); and *Goodley v. Standard Furniture Mfg. Co.*, 716 So. 2d 226, 227 (Ala. Civ. App. 1998) (the failure to appear at a hearing did not warrant a dismissal with prejudice "[b]ecause the record reveal[ed] no delay, willful default, or contumacious conduct"). *See also Weatherly v. Baptist Med. Ctr.*, 392 So. 2d 832 (Ala. 1981) (reversing a dismissal with prejudice under Rule 37, Ala. R. Civ. P., when the evidence did not support a determination that the plaintiff had willfully failed to respond to interrogatories). It does not appear from the research conducted by this court that the dismissal of claims due to a failure to comply with court rulings during a trial has been previously addressed or sanctioned by our courts.

In her brief on appeal, Capaci argues, among other things, that the evidence does not support a conclusion that her conduct during her testimony was willful or contumacious, and she contends that the trial court could have chosen a less drastic sanction than the dismissal of her claims with prejudice.

The record clearly indicates that Capaci did not comply with the trial court's orders to confine her

answers to the questions asked of her. Although the trial court did warn Capaci of the potential consequences of her conduct, it warned her that it would either terminate her testimony or end the trial; the trial court did not indicate that it was considering the dismissal of Capaci's claims, and Folmar Kenner did not move for such a ruling. Also, Capaci's statements made after the trial court's warnings indicated that those warnings made Capaci increasingly nervous, which seemed to have exacerbated her tendency to elaborate in her testimony.

The determination of whether a party's conduct was willful or contumacious is within the trial court's discretion. "Because the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court." *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d at 341 (citing *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976), and *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1051 (9th Cir. 1971)). However, the dismissal of a party's claim with prejudice is a drastic sanction that should be used only in extreme situations. *Burdeshaw v. White*, 585 So. 2d at 847. Further, "'[d]ismissal orders must be carefully scrutinized, and the plaintiff's conduct must mandate dismissal.'" *Hosey v. Lowery*, 911 So. 2d at 17 (quoting *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 87 (Ala. 1989)).

We must conclude that under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying. We recognize the difficult job of the trial court in dealing with noncompliant witnesses or parties. A trial court certainly may take measures necessary to maintain order in its courtroom. In fact, with regard to the specific facts of this case, we agree with the trial court that Capaci's failure to heed the trial court's warnings warranted some form of sanction. However, the trial court had available to it other, less drastic alternatives in enforcing its orders. Those less drastic sanctions included, but were not limited to, ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt.

We recognize and sympathize with the trial court's frustration over Capaci's behavior. Conduct such as that exhibited by Capaci is not to be condoned. The trial court was well within its power to take action to sanction Capaci for disobeying its orders in its courtroom. However, given the totality of the evidence, we conclude that Capaci's conduct did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not "'mandate dismissal.'" *Hosey v. Lowery,* 911 So. 2d at 17.

Because we find Capaci's argument on this issue to be dispositive, we pretermit discussion of the other issues raised by Capaci in her appellate brief.

REVERSED AND REMANDED.

Pittman, Thomas, and Moore, JJ., concur.

Bryan, J., dissents, with writing.

BRYAN, Judge, dissenting.

As the main opinion acknowledges, "[t]he determination of whether a party's conduct was willful or contumacious is within the trial court's discretion" because "'[t]he trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance. . . .'" ___ So. 2d at ___ (quoting *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991)). This rule is particularly apt in the resolution of the appeal now before us because the trial judge had the opportunity to observe Andra Capaci's demeanor while she disobeyed his orders. Yet, in concluding that Capaci's conduct was not sufficiently willful or contumacious to justify the dismissal of her claims with prejudice, the majority has disregarded this rule and substituted its judgment regarding the degree of Capaci's culpability for that of the trial judge.

Moreover, none of the less drastic sanctions suggested by the main opinion would have effectively redressed the prejudicial effect of Capaci's self-serving,

nonresponsive answers. Neither terminating her testimony, nor terminating her presentation of evidence altogether, nor striking the testimony she had already given, nor citing her for contempt would have eliminated the effect her improper testimony had already had on the jury. Moreover, declaring a mistrial after four days of trial would have punished Folmar Kenner, LLC, as much as it would have punished Capaci.

The record supports the trial judge's implicit finding that Capaci's misconduct was willful or contumacious; our caselaw authorizes the trial judge to dismiss a plaintiff's claims with prejudice when the plaintiff's disregard of the trial judge's orders is willful or contumacious, *see Jones v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d at 341, and, contrary to the main opinion's suggestion, no lesser *effective* sanction was available. Therefore, I do not find the trial judge's dismissal of Capaci's claims with prejudice to be an abuse of his discretion. Consequently, I must respectfully dissent from the main opinion.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

FOLMAR KENNER LLC Plaintiff v. CAPACI ANDRA DBA ANDRA CAPACI REAL ESTATE Defendant	)	**Case No.:** CV-2004002311.00

ORDER

(Filed Mar. 21, 2007)

This case is hereby DISMISSED. Judgment for the Defendant. Costs taxed against the Plaintiff.

DONE this 21st day of March, 2007

/s JOHN R LOCKETT
CIRCUIT JUDGE

EXHIBIT A

STATE OF ALABAMA

IN THE CIRCUIT COURT
FOR THE COUNTY OF MOBILE

THIRTEENTH JUDICIAL CIRCUIT

FOLMAR KENNER, LLC,

V CV-2004-2311

ANDRA CAPACI, ETC.

REPORTER'S OFFICIAL TRANSCRIPT
CROSS EXAMINATION OF ANDRA CAPACI

BEFORE: Honorable John R. Lockett and Jury
Mobile, Alabama – February 29, 2007

APPEARANCES:

For the Plaintiff:

Steven Thornton, Esq.
Kenneth J. Riemer, Esq.
Attorneys at Law

For the Defendant:

George M. Walker, Esq.
Attorney at Law

CAROL MORRISON
OFFICIAL COURT REPORTER

* * *

[R-82] Q That was the large sectional sofa?

A Yes.

Q Okay.

A No, it was not sectional. It was put together all like in one curved piece.

Q Well, you have large sectional sofa $4,000.00. You have custom sectional backless sofa for $5,000.00. You represented that one or the other of the sofas cost $4,000.00 or $5,000.00, right?

A One sofa cost about 4,000. That was the comfortable big one with the two chairs that went back.

Q In this return to the IRS you represented the office sofa cost $1304.00 and that you got it on December 7th, 2001, correct?

A Well, can I ask you – These are from 1999, 1999 figures here, 7/1999.

Q I am not arguing with you about it. I just want you to confirm that that's the representation that you made to the IRS.

A I don't understand it; I will be honest.

Q You don't have to understand it. I just want you to agree with me that that is the figure that's on your return to the IRS?

A I don't know.

Q You don't know. You can't see it there?

[R-83] A. I cross my heart and hope to die, I don't know. It says, 2004. I don't know where this

came from. I don't know where Shep got this. I didn't give it to him.

Q No, ma'am. I hadn't ask you any of that. I just want to know –

THE COURT: Okay. That's fine, Mr. Walker. Ladies and gentlemen, I am going to – I think we have gone long enough today, ladies and gentlemen. On behalf of the State of Alabama and the County of Mobile I certainly do appreciate your service during this course of this week. Mr. Berson here will have a check for the services for the time that you have rendered during the course of this case. I do appreciate your duty.

I know that jury service is not a – It is an inconvenience to most. It is a hardship to many. I do appreciate the time that you have taken during the course of the trial, during the course of this week.

Mr. Berson will go ahead and give you your checks and you can exit out the jury deliberation room. Again, thank you all very much for your service.

[R-84] (Jury not present.)

THE COURT: I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, cost attached to the plaintiff on this matter.

MR. WALKER: Thank you, Your Honor.

MR. THORNTON: Judge, we just reserve our objections.

THE COURT: You have got them all. Ms. Morrison will be available here to make whatever objections you would like to put on the record.

MR. WALKER: You said cost to the plaintiff, you meant against this plaintiff?

THE COURT: Yes.

MR. RIEMER: We would object to your decision.

THE COURT: I understand.

MR. THORNTON: I guess we except to your decision for a mistrial.

MR. WALKER: I don't think he declared a mistrial.

THE COURT: I dismissed the case with prejudice. You have 4 days to file your notice of appeal.

* * *

IN THE SUPREME COURT OF ALABAMA

[SEAL]

January 22, 2010

1070824 Ex parte Folmar Kenner, LLC. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Andra Capaci d/b/a Andra Capaci Real Estate v. Folmar Kenner, LLC) (Mobile Circuit Court: CV-04-2311; Civil Appeals : 2060846).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on January 22, 2010:

Application Overruled. No Opinion.
PER CURIAM – Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 18, 2009:

Reversed And Remanded. PER CURIAM – Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this

Court's judgment in this cause is certified on this date, IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of January, 2010.

/s/ [Illegible]
Clerk, Supreme Court
of Alabama

Subj: **Yesterday in Court (Monday)**
Date: 2/27/2007 12:25:34 PM Central Standard Time
From: Rllipsey87@aol.com
To: andra@andracapaci.com, steve@lawlives.com

I have never seen such a jerk for a defense attorney as was George Walker who intentionally mislead the jury with his opening remarks: no building is water proof ; Andra mismanaged the air conditioning; she is only after money "Lots of money"! ; she committed fraud by valuing her belongings at $400,000-700,000 and then admitted it was actually under $20,000 ; and after remediation, "her own expert found no detectable mold anywhere" which is a lie since Driskill's lab results showed mold in the air on 5/27/07 in the five air samples.

The judge, Lockett, was not fair to Mr. Thornton or to me and did not seem to care that he made so many errors that could allow the case to be appealed. He would not let a single exhibit to be marked for the jury to see during my direct exam, but allowed Walker to mark a stack of irrelevant trash, to be marked for the jury to read during deliberation. Lockett would not allow me to finish most of my answers and threatened me to stop talking after saying yes to everything Walker read to the jury and concluded with, "Do you agree with that"? Lockett would not allow Mr. Thornton to ask any questions from the documents that Walker got to mark as exhibits not even as hypothetical's!

I felt that the judge tied my hands behind by back and allowed Walker to kick me on the stand, by

not allowing me to testify about key issues or finish my answers or let Mr. Thornton do his job without Walker dominating the proceedings.

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